EXHIBIT 4

42

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

FREEMAN McNEIL, et al. Plaintiffs, v. NATIONAL FOOTBALL LEAGUE, et al. Defendants.	No. 4-90-Civil-476

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGE

FEDERAL STATUTES AND RULES

UNITED STATES DISTRICT COURT
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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Preliminary Statement

Plaintiffs, eight professional football players, submit this memorandum in support of their motion for partial summary judgment striking the labor exemption defense asserted by the National Football League and its 28 member clubs (collectively the "NFL defendants") in their Second and Third affirmative defenses to the Complaint. Specifically, this motion seeks to dismiss the NFL defendants' claim that despite the acts of the NFL players and the NFL Players Association ("NFLPA") terminating the NFLPA's status as the players' collective bargaining representative, the so-called "nonstatutory labor exemption"

continues to shield the NFL defendants' anticompetitive player restraints from the antitrust laws.

The issue presently before the court arises as a direct consequence of the Eighth Circuit's decision in Powell v. National Football League, 888 F.2d 559 (8th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3615 (U.S. Mar. 12, 1990) (No. 89-1421). In that case, the panel majority held that the nonstatutory labor exemption survives the expiration of a collective bargaining agreement and applies so long as there is an "ongoing collective bargaining relationship" between management and labor. As the dissenting member of the panel pointed out, the Powell decision left the NFLPA with the choice of being forever bound to the NFL defendants' player restraints or forfeiting its collective bargaining rights.[1]

Faced with Eighth Circuit's decision, the NFLPA soon made its choice, relinquishing its role as a collective bargaining representative. First, pursuant to a vote by its Executive Committee, the NFLPA notified the NFL's bargaining

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1. The players remain convinced that the Eighth Circuit's decision is in error and that they should not have to forfeit their rights to collective bargaining in order to pursue antitrust claims. The Powell plaintiffs have therefore filed a petition for certiorari with the Supreme Court; however, the pendency of the petition has no bearing on the issue presently before the court as, due to the change in circumstances, it makes no difference here whether Powell is affirmed or reversed.

representative that it was abandoning its collective bargaining rights. Then, upon submission by a substantial majority of NFL players of petitions revoking their authorization of the NFLPA to act as their collective bargaining representative, the NFLPA enacted by-laws preventing it from ever engaging in collective bargaining with the NFL. The NFLPA is thus no longer a union; it has been restructured as a voluntary professional association engaging in various activities other than bargaining to promote the interests of active and former players. Under the Powell court's rationale, therefore, the nonstatutory labor exemption ended no later than December 5, 1989, before the unlawful conduct of the NFL defendants complained of herein took place.[2] (Point I.A., infra).

Despite the fact that without a union the collective bargaining relationship is clearly at an end, the NFL defendants have contended, both in their Answer and in a declaratory judgment action also before this Court, The Five Smiths, Inc. v. National Football League Players Association, No. 3-90-CV-177, that the nonstatutory labor exemption continues to apply. This change in position is startling since, as noted by the Powell court, the NFL

2. The Complaint only seeks damages stemming from the system of restraints in effect beginning in February of 1990.

defendants conceded before the Eighth Circuit that the labor exemption would end "if the affected employees ceased to be represented by a certified union." 888 F.2d at 568 n.12.

Defendants' new argument appears to be that the NFLPA must be formally decertified by the NLRB before the collective bargaining relationship can end. (Answer, Third Defense). This contention is without basis in law or logic. It is clear under the federal labor laws that formal decertification is not required to bring a bargaining relationship to an end. The purpose of the certification and decertification process -- to give certain procedural benefits to unions in NLRB proceedings -- does not support its use as a sword to deprive employees of their statutorily guaranteed right not to engage in collective bargaining. (Point I.B, infra).

Incredibly, however, the NFL defendants do not stop here. Not only do they erroneously argue that formal decertification by the NLRB is required to end the labor exemption, their bottom line position is that even this would not be sufficient. (Answer, Third Defense). This is absurd. As the Eighth Circuit expressly held, the labor exemption cannot last forever; and the NFL defendants have not adduced any colorable basis for extending it to cover

restraints imposed after the termination of any collective bargaining relationship. (Point I.C, infra).

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. On November 3, 1989 the NFLPA Executive Committee met to discuss how to respond to the Eighth Circuit's then recently issued decision in the Powell case. It decided to abandon all collective bargaining rights in order to allow player antitrust challenges to the NFL defendants' system of player restraints to go forward free of the labor exemption defense. (Upshaw Aff. ¶¶ 2-3).

2. On November 6, 1989, the NFLPA Executive Committee notified the NFL Management Council of its decision to abandon collective bargaining rights. (Id. ¶ 4)

3. Over the following weeks, meetings were held among the players of the NFL teams to discuss the import of the Powell decision. The substantial majority of NFL players were in agreement with the NFLPA's decision to end union representation in order to allow player antitrust challenges to go forward. Thus, of the approximately 1500 players in the league at the time, over 930 (about 62%) signed petitions affirmatively stating that neither the NFLPA nor any other entity was authorized to act as their representative in collective bargaining. (Id. ¶ 5).

4. On December 5, 1989, the player representatives of twenty-four NFL teams met and unanimously voted to end the NFLPA's status as the players' collective bargaining representative. New by-laws were enacted, superseding and replacing the NFLPA's former constitution, pursuant to which neither the organization nor any of its members are permitted to engage in collective bargaining with the NFL, its member clubs or their agents. (Id. ¶ 6).

5. Since that date, the NFLPA ceased to be a labor union. Instead, it has been restructured as a voluntary professional association organized for the purpose of furthering the interests of active and former NFL players through various means other than collective bargaining. (Id. ¶ 7).

6. Reflecting its change in character and purpose, the NFLPA has filed a labor organization "termination notice" with the U.S. Department of Labor. Additionally, the Internal Revenue Service has reclassified the NFLPA's tax-exempt status from that of a "labor organization" to that of a "business league." (Id. ¶ 8).

7. Since November 6, 1989, the NFLPA has engaged in no collective bargaining on behalf of NFL players. Further, it informed management that it would no longer represent the players in "grievances". Instead, the players

would pursue any claims they may have against the NFL or its members on an individual basis, through their own legal counsel. (Id. ¶ 9).

ARGUMENT

THE CHALLENGED RESTRAINTS ARE NO LONGER EXEMPT FROM ANTITRUST SCRUTINY

A. The Labor Exemption Ended When The NFLPA Ceased Being The Players' Collective Bargaining Representative

In Powell v. National Football League, 888 F.2d 559 (8th Cir. 1989), the Eighth Circuit held that the nonstatutory labor exemption continued to apply to the NFL defendants' player restraints after the expiration of their collective bargaining agreement, and even after an impasse in the negotiations was reached, so long as there was an "ongoing collective bargaining relationship" between the parties. Id. at 568.

In rejecting "impasse" as the appropriate endpoint for the labor exemption (as this Court held in the decision below), the Powell court reasoned that, even after impasse, both management and unions have an "array of remedies" available under the labor laws to resolve their differences (i.e., strikes, renewed collective bargaining, or claims before the NLRB for a failure to bargain in good faith). Accordingly, the court concluded that federal labor policy overrides the antitrust laws, for previously agreed to

restraints, so long as there is a possibility that labor law remedies may be invoked. However, the court was careful to reject the NFL defendants' contention that the labor exemption can extend indefinitely, stating: "Importantly, this [holding] does not entail that once a union and management enter into collective bargaining, management is forever exempt from the antitrust laws. . . ." Id. at 568.

In the absence of continued union representation, the Powell court's rationale for the labor exemption does not apply, as there is no longer even the possibility of invoking a labor law remedy, be it collective bargaining, instituting an NLRB proceeding for a failure to bargain in good faith, or resorting to a strike. Accordingly, the Powell court expressly noted the NFL defendants' concession that the labor exemption would necessarily end "if the affected employees ceased to be represented by a certified union." Id. at 568 n.12.[3]

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3. If the NFL defendants genuinely believed that the players had not lawfully renounced their collective bargaining rights in accordance with the National Labor Relations Act, they could have filed with the NLRB an unfair labor practice charge against the NFLPA asserting an unlawful refusal to bargain in November, 1989 or in December, 1989, or at any time within the six (6) month period thereafter (29 U.S.C. § 160(b)), but they never did so. The limitations period for filing such a charge -- looking at it from the end date most generous to the NFL defendants -- expired on June 6, 1990.

As recognized by the dissenting members of the panel and the en banc court (on petition for rehearing), the Powell decision effectively left the players with the Hobson's choice of either forever accepting what they believed to be a system of illegal restraints of trade or abandoning union representation entirely in order to be able to vindicate their antitrust rights. See Id. at 570 (Heaney, J., dissenting) ("the end result of the majority opinion is that once a union agrees to a package of player restraints, it will be bound to that package forever unless the union forfeits its bargaining rights").[4]

Shortly after the Powell decision was issued, the NFLPA and the players made their choice, determining to clear the way for antitrust claims by individual players, by terminating union representation. The process began on November 3, 1989, with the vote of the NFLPA's Executive Committee to renounce collective bargaining and their notification of that decision to the NFL's bargaining arm. (Upshaw Aff. ¶¶ 2-4). Over the next several weeks, the NFLPA conducted meetings with players around the league, and a substantial majority of them affirmatively expressed their

4. Similarly, in his dissent from denial of rehearing en banc, Chief Judge Lay observed: "the union should not be compelled, short of self-destruction, to accept illegal restraints it deems undesirable." Id. at 574.

support for the decision to end union representation in order to permit individual player antitrust claims to go forward. (Id. ¶ 5). Thus, about 62% of the active NFL players at that time signed petitions revoking the authority of the NFLPA or any other entity to engage in collective bargaining on their behalf. (Id. ¶ 5).

Thereafter, on December 5, 1989, the NFLPA's player representatives voted to adopt new by-laws ending the organization's status as a collective bargaining representative. (Id. ¶ 6). Under these by-laws, which superseded and replaced the NFLPA's former constitution, no officer, employee or member of the NFLPA is permitted to discuss, deal or negotiate with the NFL, any of its member clubs or their agents. The NFLPA therefore terminated its status as a "labor organization."[5] Reflecting its change in character and purpose, the NFLPA filed a labor organization "terminal report" with the U.S. Department of Labor. Its tax-exempt status was also changed by the Internal Revenue

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5. Section 2(5) of the National Labor Relations Act, 29 U.S.C. § 152(5) defines a labor organization as an organization "which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." See also Sahara Datsun, Inc. v. NLRB, 811 F.2d 1317, 1320 (9th Cir. 1987) (defining attribute of a labor organization is that it have the purpose of negotiating with an employer); East Chicago Rehabilitation Center v. NLRB, 710 F.2d 397, 404 (7th Cir. 1983), cert. denied, 465 U.S. 1065 (1984) (same).

Service from that of a "labor organization" under Section 501(c)(5) of the Internal Revenue Code to that of a "business league" under Section 501(c)(6).

As NFL players are no longer represented by a union, there can be no question that the collective bargaining relationship between the NFL defendants and the players has ended. Therefore, under the Powell decision, the nonstatutory labor exemption expired no later than December of 1989, and the Court may proceed to consider the merits of plaintiffs' antitrust claims against the player restraints imposed by the NFL defendants since February 1, 1990.

B. The NFLPA Need Not Be Formally Decertified By The NLRB In Order To End The Labor Exemption

The NFL defendants claim that the acts taken by the NFLPA and the players to end union representation are insufficient to terminate the labor exemption. Specifically, the NFL defendants contend that in order for there even to be a possibility that the labor exemption might end, the NFLPA must first obtain a determination from the NLRB "that [its] certification is no longer operative." (Answer, Third Defense). This argument is a red herring designed to put off the NFL defendants' day of antitrust reckoning, and has no basis in either the labor laws or the rationale underlying the Powell decision.

The Powell court did not and could not hold that the existence of a bargaining relationship is dependent upon NLRB certification or decertification. To the contrary, a bargaining relationship is terminated (and the labor exemption ended) "either by a NLRB decertification proceeding or by abandonment of bargaining rights by the union." 888 F.2d at 570 (Heaney, J., dissenting).

There is no question under the federal labor laws that the existence or non-existence of a bargaining relationship is not dependant on certification by the NLRB. Rather, the sine qua non of the bargaining relationship is the union's support by a majority of the employees in the bargaining unit to act as their bargaining representative. See, e.g., NLRB v. Iron Workers, 434 U.S. 335, 344 (1978). Thus, just as certification is not necessary to create a collective bargaining relationship,[6] a decertification proceeding is not required to end it. See, e.g., NLRB v. Florida Citrus Canners Corp., 288 F.2d 630, 639 (5th Cir. 1961), rev'd on other grounds, 369 U.S. 404 (1962) (where the majority of employees have manifested their repudiation of the union, employer's duty to bargain ceases, and "it was not required to indulge in a useless gesture of petitioning

6. See, e.g., NLRB v. Gissel Packing Co., 395 U.S. 575, 596-97 (1969); NLRB v. Ralph Printing and Lithographing Co., 379 F.2d 687, 692-93 (8th Cir. 1967).

for a decertification"); NLRB v. Superior Fireproof Door & Sash Co., 289 F.2d 713, 719 (2d Cir. 1961) ("[d]ecertification is a time consuming endeavor" not necessary to end duty to bargain).

Rather than creating or ending a collective bargaining relationship, the certification process exists solely to provide certain "special privileges" to the certified union. See NLRB v. Gissel Packing Co., supra, 395 U.S. at 588-89. For example, once certified, a union's majority status is irrebuttably presumed to continue for a reasonable period, normally considered to be one year. Brooks v. NLRB, 348 U.S. 96, 98-99 (1954); United Supermarkets, Inc. v. NLRB, 862 F.2d 549, 552 (5th Cir. 1989). Following this period, the labor laws allow the employer to unilaterally withdraw recognition of the certified union, and thus end the collective bargaining relationship, if it can show either: 1) that the union in fact no longer has the support of the majority of the bargaining unit employees or 2) that it had a reasonable good-faith doubt of the union's majority status. Id. at 552. Since a bargaining adversary can terminae a bargaining relationship by simply withdrawing recognition from a certified union on the grounds that a majority of employees no longer wish to be represented in bargaining, without the

necessity of a decertification election, a fortiori employees have the same right.[7] There is, therefore, no basis whatsoever in the labor laws for the NFL defendants' contention that the NFLPA must be decertified by the NLRB in order for its status as the players' collective bargaining representative -- and thus, under the reasoning of Powell, the labor exemption itself -- to terminate.[8]

C. The NFL Defendants' Position That The Labor Exemption Never Ends Has Already Been Rejected By The Eighth Circuit

Not only do the NFL defendants erroneously contend that decertification by the NLRB is necessary to end the labor exemption, they further argue that even this procedure would "not [be] sufficient" to end the labor exemption. (Answer, Third Defense). Indeed, they continue to refuse to

7. Unlike employers, who must demonstrate a good faith doubt as to a union's majority, employees have the unconditional right "to refrain" from self organization and collective bargaining, which is guaranteed to them by § 7 of the NLRA. 29 U.S.C. § 157.

8. Indeed, in a different context, it has been held that a union may end its duty to bargain by simply disclaiming interest in representing the employees, so long as it does so in good faith. See, e.g., Corrugated Asbestos Contractors Inc. v. NLRB, 458 F.2d 683 (5th Cir. 1972) (union cannot be forced "to continue, against its wishes, a relationship that is in its very nature predicated upon voluntariness and consent"). In the instant case, the good faith issue does not arise, as a majority of the employees have indicated their wish not to be represented in collective bargaining at all, whether by the NLFPA or any other entity.

articulate precisely what acts they believe would suffice to end the exemption, making it clear that their real position is that the exemption simply never ends.

Not only has the NFL defendants' position of endless antitrust immunity already been expressly rejected by the Eighth Circuit in Powell (888 F.2d at 568), it is contrary to the most fundamental labor law principle -- that just as employees have the right to bargain collectively through a labor organization, they also have the right not to do so. See 29 U.S.C. § 157; See also NLRB v. National Car Rental System, 672 F.2d 1182, 1190 (3d Cir. 1982) (bargaining representative cannot be imposed on employees who do not wish to be represented); NLRB v. Mayer, 196 F.2d 286, 289 (5th Cir. 1952) (employees have the right to designate a collective bargaining representative as well as the right to revoke such designation); NLRB v. Sterling Electric Motors, 109 F.2d 194, 202 (9th Cir. 1940) (employees have the right to deal individually with the employer). Thus, the NFL defendants' argument that by exercising their right to refrain from union representation the players have somehow wrongfully "deprived the NFL clubs . . . of their opportunity to bargain" is absurd.[9] If

9. See Complaint in The Five Smiths v. NFLPA, No.3-90-CV-177, ¶ 51. In this declaratory judgment action against the (continued...)

employees exercise their right to choose not to be represented by any union --as the NFL players have done here -- then their employers have no right to demand otherwise.

Indeed, even the NFL defendants appear to be coming to the reluctant recognition that the labor exemption can no longer apply to this non-union industry. In recently amending their declaratory judgment action in The Five Smiths case, the NFL defendants have added a new claim under the antitrust laws against the NFLPA. (Amended Complaint in Five Smiths, Count IV). Leaving aside the impropriety of the Five Smiths case in the first place, this latest move only underscores the futility of the NFL defendants' invocation of the labor exemption defense in this case. Clearly, if there were an ongoing collective bargaining relationship such as would allow the labor exemption to continue under the Powell ruling, the exemption would apply to both parties to the relationship. By bringing an antitrust claim against the NFLPA, the NFL defendants appear

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9. (...continued)
NFLPA, the NFL defendants essentially seek adjudication of the same labor exemption issue raised by this motion. However, this issue cannot appropriately be adjudicated in that case, since the NFLPA, the only defendant in that case, is not a proper party to any player antitrust challenge to the NFL defendants' system of player restraints. (See NFLPA's Motion to Dismiss the Five Smiths Complaint).

to recognize that there is no longer any such relationship in existence.[10]

In sum, the point has now been finally reached where, even under the Eighth Circuit's decision in Powell, labor law policy must yield to the strong federal policy favoring free competition and markets as embodied in the antitrust laws. If, as the NFL defendants have so often asserted, their system of restraints on competition for player services is nothing more than a reasonable restraint of trade, they have nothing to fear. Plaintiffs seek no more than the opportunity to prove otherwise.

CONCLUSION

For the foregoing reasons, this Court should grant plaintiffs' motion for partial summary judgment and declare that the labor exemption does not apply to the post-January 1990 restraints challenged in this case. Defendants' Second and Third Defenses should accordingly be stricken from their Answer.

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10. Of course, in artfully pleading their antitrust claim as contingent, i.e., only effective if the labor exemption is held not to apply, the NFL defendants make an attempt to straddle both sides of the fence. By contrast, although it is not a party to the instant lawsuit, the NFLPA has publicly indicated that it has no need or desire to engage in such legal contortions. It welcomes the opportunity to have the antitrust laws applied to all aspects of competition for player services in the NFL, as the players have been claiming for almost three years.

Dated: August 1, 1990

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

FREEMAN McNEIL, et al. Plaintiffs, v. NATIONAL FOOTBALL LEAGUE, et al. Defendants.	No. 4-90-Civil-476 PROPOSED ORDER

Having considered plaintiffs' Motion for Partial Summary Judgment, and the parties' briefs and arguments in support and opposition thereto, the Court is of the opinion that such motion is meritorious and should be granted. Therefore, the Court DECLARES that the labor exemption defense does not apply to the post-January 1990 restraints challenged in this case and, accordingly, ORDERS that defendants' Second and Third Defenses be stricken from their Answer.

Dated: _____, 1990

_____
David S. Doty
United States District Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

FREEMAN McNEIL, et al. Plaintiffs, v. NATIONAL FOOTBALL LEAGUE, et al. Defendants.	No. 4-90-Civil-476 PLAINTIFFS MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs, eight professional football players, move, pursuant to Rule 56, Fed. R. Civ. P., that the court grant partial summary judgment to plaintiffs with respect to defendants' Second and Third Affirmative Defenses, which assert that plaintiffs' antitrust claims are barred by the nonstatutory labor exemption to the antitrust laws. In support of this motion plaintiffs state as follows:

1. Under the Eighth Circuit's decision in Powell v. National Football League, 888 F.2d 559 (8th Cir. 1989), the nonstatutory labor exemption continued to apply to the defendants' player restraints so long as an "ongoing collective bargaining relationship" existed.

2. In response to the Powell decision, and in order to make possible individual player antitrust lawsuits

such as the instant case, the NFLPA, with the support of a majority of its player members, relinquished its role as the players' collective bargaining representative, ending the collective bargaining relationship with defendants and the corresponding labor exemption.

3. Defendants' arguments that the NFLPA must be formally decertified by the NLRB as well as take other unspecified measures before the labor exemption can end are without any legal basis.

WHEREFORE, plaintiffs request that this Court issue an order striking the Second and Third Affirmative Defenses from defendants' Answer.

Dated: August 1, 1990

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

FREEMAN McNEIL, et al. Plaintiffs, v. NATIONAL FOOTBALL LEAGUE, et al. Defendants.	No. 4-90-Civil-476 NOTICE OF MOTION

To: Defendants and their attorneys, Herbert Dym, Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D. C. 20044

PLEASE TAKE NOTICE that on October 26, 1990 at 9:00 a.m., in the United States District Court for the District of Minnesota, before the Honorable David S. Doty, plaintiffs will present their motion for Partial Summary Judgment on defendants' Second and Third Affirmative Defenses, pursuant to Rule 56, Federal Rules of Civil Procedure. A copy of the motion is attached to this notice.

Dated: August 1, 1990

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